No. 15,629

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUISE L. COBIN,

Appellant,

vs.

MIDLAND MUTUAL LIFE INSURANCE COMPANY, a corporation,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.
Hon. Thurmond Clarke, Judge.

APPELLEE'S BRIEF.

ADAMS, DUQUE & HAZELTINE,
523 West Sixth Street,
Los Angeles 14, California,
Attorneys for Appellee.

HENRY O. DUQUE,
JAMES S. CLINE,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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STATEMENT OF THE CASE.

Introduction.

Appellant's entire argument on this appeal is based on the assumed premise that a contract of life insurance sprang into existence when appellee, at its Home Office on February 11, 1954, "issued" a policy of insurance naming Leo Cobin as the insured. From this assumed fact, appellant argues that the trial court committed several grievous errors of law which require reversal of the judgment for appellee. Appellant's argument, however is spurious since it begs the question by assuming as true the very fact which was in issue at the trial of the action and which was found to be untrue by the trial court. In this connection the court found that Leo

Cobin made application for a policy to be issued at standard premium rates (an offer), that appellee issued a different policy than the one applied for and which called for higher than standard premiums (a rejection of the offer and a counter-offer) and that Leo Cobin "refused to accept and did reject" the policy as issued (a rejection of the counter-offer) [Clk. Tr. pp. 28-29]. The court then concluded that at the death of Leo Cobin, no contract of insurance existed between appellee and Leo Cobin [Clk. Tr. p. 30, lines 24-25]. At best, therefore, appellant's argument for reversal must be based on the proposition that the trial court's findings are not supported by the evidence, a position which itself is untenable.

The evidence when viewed, as it must be, in support of the District Court's findings of fact, may be summarized as follows: Appellant Louise L. Cobin was the wife of Leo Cobin, now deceased. About two months prior to his untimely, and quite unexpected, death, Leo Cobin made written application to appellee Midland Mutual Life Insurance Company for a $25,000.00 policy of insurance. At the same time Mrs. Cobin also made application to appellee for a similar policy. After executing separate applications, Mr. and Mrs. Cobin gave appellee's soliciting agent, Mr. Bloome, $130.00 as a deposit to be applied toward the first premium due on the policies applied for. In return, they received from Mr. Bloome two documents, each entitled "Deposit Receipt" and which together acknowledged receipt of the $130.00 deposit.

Mrs. Cobin's application was approved, and appellee issued to her a policy exactly as applied for. Appellee, however, modified Mr. Cobin's application and issued in his name a policy different from that applied for, *i.e.,* the policy was rated as "Special Class A" which called for higher than standard premiums. When Mr. Bloome re-

ceived the policies and offered them to Mr. Cobin, Mr. Cobin took possession of the policies but told Mr. Bloome that he could not accept them until he discussed the matter with his attorney. Two days later Mr. Cobin returned the policies to Mr. Bloome and stated that he had, on the advice of his attorney, concluded that the insurance was unnecessary to his estate plan and that he therefore would not accept the policies and wanted them cancelled. Mr. Cobin then returned to Mr. Bloome both policies and the deposit receipts. Thereafter Mr. Bloome returned the policies and the deposit receipts to appellee's Home Office in Ohio where the policies were cancelled and stamped "Not Taken. Mar. 3, 1954." Mr. Cobin died two days later on March 5, 1954.

The within action is a consequence of appellant's insistence, contrary to the decision of the trial court, that the policy issued upon the life of her husband was in force and was effective as a contract on the date of his death. As beneficiary, she seeks to recover the face amount of that policy.

The legal principles applicable to this case are not complicated. They involve only the basic and fundamental concepts applicable to the formation of a contract, for, although it apparently has been ignored by appellant, an insurance policy is nothing more than a contract. In this regard appellee contends (a) that Mr. Cobin's application constituted an offer to purchase life insurance, (b) that in modifying Mr. Cobin's application and issuing a policy different from that applied for, appellee rejected Mr. Cobin's offer and in effect made a counter-offer, (c) that Mr. Cobin's refusal to accept the policy as issued constituted a rejection of appellee's counter-offer, and consequently the policy, though "issued", did not ripen into a contract. Appellee also contends, in the alternative, that if a contract did come into existence, it was cancelled by appellee at the request of Mr. Cobin.

By means of devious legal reasoning involving improper classification of terms and application of theories, appellant seeks to confuse the fundamental and simple principles governing this cause. In so doing, appellant has assumed as established the basic issue presented for decision. Throughout her brief, appellant has repeatedly assumed and stated as a fact that Mr. Cobin applied for a "rated" policy. Such was not the fact and the District Court so found [Clk. Tr. p. 28, lines 2-10]. From her assumption that Mr. Cobin applied for a rated policy, appellant reasons that a completed contract of insurance came into existence when appellee prepared a rated policy for delivery to Mr. Cobin, actual delivery or acceptance being unnecessary. Similarly, appellant also contends that the "issuance" of the policy being admitted, it follows that the existence of the contract is also admitted and accordingly an actual delivery to or acceptance of the policy by Mr. Cobin was unnecessary. Such reasoning must fail since, as will hereinafter be demonstrated in detail, appellant's assumed fact is contrary to the trial court's finding which is supported by very substantial evidence.

When viewed in its proper perspective, therefore, appellant's appeal is primarily based on the contention that the findings of fact are not supported by the evidence. Appellant, however, seeks to classify the issues on appeal as involving matters of law rather than merely the sufficiency of the evidence. Thus, in her Opening Brief under the paragraph entitled "Prefatory Statement" (p. 4), appellant states in general terms that the trial court erroneously received "a plethora of inadmissible testimony, which reflects such fundamental disregard of established rules of evidence as to constitute prejudicial error . . ." It is true that appellant objected to almost every question asked the various witnesses, but the great majority of these objections were based on the theory that the actual negotiations of the parties were immaterial

since it was admitted that a policy was "issued". As pointed out above, such theory begged the question since it assumed that the "issuance" of the policy constituted an acceptance of Mr. Cobin's offer to purchase life insurance. This, of course, leads one back to the starting point: Did or did not Mr. Cobin make application for a "rated" policy and, if so, did he thereafter cancel or reject the policy when it was offered to him? These questions depend for their answer on the terms of the negotiations between the parties. Consequently, the trial court very properly overruled appellant's objections to the admission of evidence on this subject.

Again in her Opening Brief under the paragraph entitled "General Statement" (p. 12), appellant states:

> "This case presents the following significant issue: Where an insurance application accompanied by the initial premium has been accepted by the insurer, and a policy *conforming to said application* has been issued and delivered to the insured, may the insurer avoid liability to the Beneficiary widow upon the ground that prior to the insured's death the policy was returned to the Insurer, when prior to any communication to the insured of its acceptance of, or consent to, cancellation of the policy, and before any tender or offer to restore the premium paid had been made, the insured has died?" (Emphasis added.)

Such issue is hardly significant when it assumes one of the important questions in dispute, viz., that the policy issued by appellee conformed to the application of Mr. Cobin.

Notwithstanding appellant's attempt to classify the issues on this appeal as legal or as matters of law, the only real question presented is whether the evidence supports the findings of fact. There can be no doubt in this regard as the evidence in support of the findings is clearly substantial.

The Pleadings.

A review of the pleadings indicates that the primary issue presented to the trial court was: Was the policy of life insurance, which was admittedly issued to Leo Cobin, ever unconditionally delivered to and accepted by Leo Cobin during his lifetime, or conversely, was said policy, when it was offered to Leo Cobin, in fact rejected and returned by him to appellee for cancellation?

As stated, this issue is essentially a factual one which was resolved against appellant by the trial court. In this regard it is most significant that both the policies and the deposit receipts [Pltf. Exs. 5 and 6; Deft. Exs. A and B] were in appellee's possession at the time Mr. Cobin died. To explain this circumstance, appellant, in her original verified complaint, alleged that after the policy had been issued it was received by Mr. Bloome and orally offered to and accepted by Mr. Cobin, but at Mr. Cobin's request, was not physically delivered into his possession [Clk. Tr. p. 2, lines 16-24].

After the deposition of Mr. Bloome had been taken by appellant and appellant discovered that prior to his death Mr. Cobin had been given temporary possession of the policies but had thereafter returned them to Mr. Bloome, appellant filed an amended complaint. In this pleading her explanation of the fact that the policies were in appellee's possession at Mr. Cobin's death was that Mr. Cobin's policy had been returned to Mr. Bloome by Mr. Cobin for the purpose of ascertaining whether appellee would permit an increase in the face amount of said policy, as of its original date of issue, from $25,000.00 to $50,000.00 [Clk. Tr. p. 19, lines 12-24]. At

the trial, Mrs. Cobin's testimony was in accord with these allegations [p. 57, line 15, to p. 59, line 22].*

By her testimony at the trial, appellant claimed to have been present both when the policies were delivered to Mr. Cobin [p. 18, line 1, to p. 20, line 8] and when they were returned by Mr. Cobin to Mr. Bloome [p. 57, line 15, to p. 59, line 22]. However, she had no satisfactory explanation for the difference in the statements in her original verified complaint and those she testified to at the trial [p. 59, line 23, to p. 69, line 14].

Both in its answer to appellant's original complaint [Clk. Tr. p. 5, line 19, to p. 6, line 22] and in its answer to appellant's amended complaint [Clk. Tr. p. 23, line 19, to p. 24, line 21], appellee denied that Mr. Cobin had accepted the policy of insurance and affirmatively alleged that Mr. Cobin had not only rejected the policy but also had returned it to appellee for cancellation after it had been offered to him. Appellee also specifically contended in its answers that Mr. Cobin's application was for a policy to be issued at standard premium rates but that the policy that was issued to Mr. Cobin was issued with a Special Class A premium rate.

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*All references to Reporter's Transcript unless otherwise noted.

STATEMENT OF FACTS.

Chester Bloome is a life insurance salesman employed by appellee, The Midland Mutual Life Insurance Company [p. 84, line 17, to p. 85, line 19]. His business is conducted through Sam Van Elgort who is the general agent for Midland Mutual in charge of supervising an agency staff for the purpose of selling life insurance in the Los Angeles area [p. 276, line 19, to p. 277, line 5; p. 127, line 6, to p. 128, line 12]. Neither Mr. Bloome nor Mr. Van Elgort have authority to approve applications or to issue policies of insurance, these being functions performed only at appellee's Home Office in Ohio [Pltf. Exs. 1 and 3].

Although they were not intimate friends, Mr. Bloome met plaintiff Louise L. Cobin and her husband, Leo Cobin, socially in 1950 or 1951. Sometime in April or May of 1953, Mr. Bloome first contacted Mr. Cobin with respect to life insurance. As part of his sales approach, Mr. Bloome offered to survey Mr. Cobin's insurance program and, in this connection, to audit the policies already in existence on Mr. Cobin's life. These existing policies, exceeding $95,000.00 in amount [p. 79, line 14, to p. 80, line 14], were held in companies other than Midland Mutual and were not in Mr. Cobin's possession. Consequently, several months elapsed before Mr. Bloome completed his audit for Mr. Cobin [p. 33, lines 9-24; p. 85, line 20, to p. 87, line 16; p. 180, lines 10-12].

Mr. Bloome's review of Mr. Cobin's insurance program was completed in September 1953, at which time he suggested that the Title Insurance and Trust Company make an analysis of Mr. Cobin's assets and overall estate plan. This was agreeable to Mr. Cobin, and under date of December 4, 1953, the Title Insurance and Trust Company, through Charles A. Windham, Assistant Trust Officer, submitted such an analysis to Mr. Cobin [p. 37,

line 6, to p. 38, line 17; p. 88, line 2, to p. 90, line 9; Deft. Ex. E].

Following the discussions with Mr. Windham, Mr. Bloome suggested that Mr. and Mrs. Cobin each apply for a $25,000.00 life insurance policy [p. 90, lines 10-21]. Thereafter, Mr. Bloome met with Mr. and Mrs. Cobin at their home on the evening of December 14, 1953. Mrs. Cobin testified that at this meeting her husband stated he was prepared to "go ahead" and requested that Mr. Bloome make out applications for two $25,000.00 policies, one upon his life and one upon her life [p. 39, line 10, to p. 41, line 24]. It was also her testimony that prior to the execution of the applications Mr. Cobin specifically requested and asked for a policy with a Substandard A rating, *i.e.,* one calling for higher premiums than normal [p. 43, lines 12-15]. This was denied by Mr. Bloome who testified that while he knew that certain of Mr. Cobin's other policies were rated [p. 128, line 13, to p. 130, line 5], it was Mr. Cobin's desire to make application to Midland Mutual for a standard, non-rated policy [p. 93, lines 5-18; p. 138, line 19, to p. 139, line 25].

Mr. Cobin and Mrs. Cobin each executed the first part (Part I) of separate applications for Preferred Life to 85 policies of insurance in the face amount of $25,000.00 [p. 10, line 20, to p. 12, line 4; p. 41, line 25, to p. 42, line 10; p. 91, line 12, to p. 92, line 16]. The insurance applied for as designated in question No. 12 of Part I of Mr. Cobin's application [Pltf. Ex. 1] was exactly the same as that applied for in Part I of Mrs. Cobin's application [Pltf. Ex. 3]. Although it was not disputed that Mrs. Cobin's application was for an ordinary, non-rated policy, appellant contends that Mr. Cobin's application was for a rated policy. The District Court found against this contention [Clk. Tr. p. 28, lines 6-10].

After Mr. and Mrs. Cobin signed their respective applications they gave Mr. Bloome a check for $130.00 [Pltf. Ex. 4]. Mr. Bloome testified that in return for the check he gave Mr. and Mrs. Cobin two deposit receipts [Deft. Exs. A and B; p. 97, line 12, to p. 100, line 9]. Even though these two receipts were for a total sum of $130.00 and were dated December 14, 1953, Mrs. Cobin denied receiving them or ever having seen them prior to the commencement of the within action [p. 44, line 8, to p. 45, line 22]. A physical examination of the deposit receipts themselves, however, shows that they bear the same number as Part I of the applications [Pltf. Exs. 1 and 3] and in fact were obviously torn off the bottom of Part I of the applications. Moreover, the specific instructions printed on the face of the receipts state as follows:

> "If the full first premium is paid in cash or by note this receipt must be completed and given to the applicant; IF NO SUCH DEPOSIT IS MADE, THIS RECEIPT MUST NOT BE DETACHED."

Mrs. Cobin also testified that the check for $130.00 was given to Mr. Bloome in payment of the first month's premium on the policies for which application was made [p. 12, lines 5-8; p. 13, lines 12-21; p. 42, line 11, to p. 44, line 7]. Both Part I of the applications (Question No. 20, *et seq.*) and the deposit receipts themselves, however, state that such sum was received not in payment but rather merely as a deposit to be held in escrow. In the event the policy applied for was issued, the deposit was to be applied toward payment of the first premium, and the insurance would thereby take effect retroactively, as of the date of the application. On the other hand, if the policy applied for was not issued or if a policy differing from that applied for was issued, the deposit was not to be used to put the insurance into effect immediately. In this latter case, the insurance was not to become effective until the modified policy was actually

delivered to or accepted by the applicant [Deft. Exs. A and B].

The preliminary information given to Mr. Bloome by Mr. Cobin earlier in the year indicated that Mrs. Cobin's birthdate was August 7, 1918. At the December 14, 1953 meeting, however, Mr. Bloome discovered that Mrs. Cobin was actually born one year earlier [p. 140, line 15, to p. 145, line 21]. He then determined that the monthly premium for Mrs. Cobin at her correct age would be $57.50. This figure was entered on the front page of Part I of Mrs. Cobin's application [Pltf. Ex. 3, Question 20; p. 112, lines 20-24; p. 258, lines 19-23] and on Mrs. Cobin's deposit receipt [Deft. Ex. B; p. 145, line 22, to p. 148, line 17; p. 200, line 21, to p. 202, line 7].

Mr. Cobin then expressed the thought that it might be better to pay premiums annually or semi-annually rather than monthly. At this point Mr. Bloome felt he had "made a sale" and, since the hour was getting late, was not anxious to extend the meeting unduly by recalculating premiums because he felt he thereby might possibly lose the sale. He explained that although the applications specified that premiums were to be paid monthly, Mr. Cobin could, at the time the policies were delivered, change the premium period and pay the premiums on an annual or semi-annual basis. Mr. Bloome therefore requested a check for $130.00, an estimated amount which he knew was more than enough to cover the deposit on both applications [p. 94, line 13, to p. 96, line 17; p. 148, line 18, to p. 150, line 19; p. 207, line 19, to p. 211, line 14].

The difference between the amount of the check and the monthly premium for Mrs. Cobin was $72.50. This sum did not represent the monthly premium for Mr. Cobin but was inserted by Mr. Bloome in Mr. Cobin's deposit receipt [Deft. Ex. A] as a matter of convenience

since the $130.00 was only an estimated figure [p. 199, line 16, to p. 200, line 17; p. 219, line 20, to p. 221, line 14]. Such was neither an unusual or uncommon practice under the circumstances [p. 217, line 16, to p. 218, line 17]. Mr. Bloome did not, however, enter the figure of $72.50 on the corresponding portion of Part I of Mr. Cobin's application [Pltf. Ex. 1, Question 20]. This space was left blank and the figure $69.52 was filled in later by the agency cashier [p. 111, line 15, to p. 112, line 7; p. 213, line 14, to p. 214, line 24; p. 259, lines 4-7]. This was clearly a mistake since even on a rated basis Mr. Cobin's monthly premium would have been only $66.00 [Pltf. Ex. 5; p. 312, lines 9-13].

At the conclusion of the December 14th meeting, Mr. Bloome informed the Cobins that they each would be required to take a physical examination and that he would make the necessary appointments, which was agreeable to Mr. and Mrs. Cobin [p. 42, lines 11-17]. Mr. Bloome then delivered Part I of the applications and the check for $130.00 to the Van Elgort agency [p. 100, lines 17-23]. The applications were sent to appellee's Home Office in Ohio where they were received on December 17, 1953. The check, however, was not forwarded to appellee's Home Office but was deposited in the agency's trust account [p. 293, line 20, to p. 294, line 1].

Although Part I of these applications had been signed and submitted to appellee, Mr. Cobin was, for the next seven (7) weeks undecided whether to complete the applications. It was not until January 28, 1954, that he finally agreed to have a medical examination and to complete Part II of his application which contained his statements to the medical examiner [Pltf. Ex. 2]. Mrs. Cobin did not submit to a medical examination until February 1, 1954, but Part II of her application was not introduced into evidence since it was not otherwise material [p. 48, lines 16-18].

While at the trial Mrs. Cobin disclaimed any knowledge as to why Mr. Cobin delayed the completion of the applications [p. 45, line 24, to p. 52, line 7], it was apparent that Mr. Cobin was not sure whether he really wanted the insurance and that he was considering withdrawing his application to appellee. Mr. Bloome testified that on the day following his December 14th meeting with the Cobins, he telephoned Mr. Cobin and made an appointment for him and his wife to be examined a few days thereafter [p. 101, line 17, to p. 103, line 5]. Neither Mr. nor Mrs. Cobin kept this appointment, and when Mr. Bloome inquired as to the reason, Mr. Cobin said that he was conferring with other insurance salesmen and with his attorney, Irving I. Emmer, regarding the insurance and "until he found out further, one way or the other, he wasn't going in for the examination." [p. 103, line 6, to p. 104, line 2]. Thereafter Mr. Bloome had several other conversations with Mr. Cobin concerning the medical examination [p. 107, lines 17-25; p. 223, line 11, to p. 225, line 7]. He also, by a letter dated January 11, 1954, offered to further review Mr. Cobin's insurance program [Deft. Ex. D]. Mrs. Cobin testified that she could not recall ever having seen this letter [p. 69, line 15, to p. 71, line 13].

Finally, in the latter part of January, 1954, Mr. Bloome met Mr. Cobin at the latter's place of business. He told Mr. Cobin that he had received a letter from appellee's home office [Pltf. Ex. 16] stating that the applications were being withdrawn from consideration because of Mr. and Mrs. Cobin's refusal to submit to a medical examination [p. 104, line 17, to p. 105, line 4; p. 227, line 6, to p. 228, line 20]. Faced with this ultimatum, Mr. Cobin submitted to a physical examination and completed Part II of his application on January 28, 1954 [Pltf. Ex. 2], although subsequent developments made it clear that he was still in doubt as to whether he wanted the insur-

ance. On January 29, 1954, before Part II of Mr. Cobin's application was forwarded to appellee's home office and before appellee's home office knew that Mr. Cobin had taken the medical examination, appellee's medical director wrote to Mr. Cobin and advised him that his application was being withdrawn from consideration [Deft. Ex. C].

Mrs. Cobin expressly denied that during this period Mr. Cobin had ever stated that he was not sure he wanted the insurance for which he had made application [p. 48, lines 4-8]. In adidtion to Mr. Bloome's testimony to the contrary, however, Harry N. Koff and Richard M. Grosten, both disinterested witnesses, testified that Mr. Cobin was undecided whether he should complete his applications to Midland Mutual and sought their advice on the subject.

Mr. Koff is a life insurance salesman for The Massachusetts Casualty Insurance Company of Boston [p. 158, lines 3-20]. On occasion, however, he places insurance with other companies. He knew Mr. Cobin and was familiar with his overall insurance program [p. 164, line 25, to p. 165, line 3]. He had, in fact, in 1952, sold Mr. Cobin a policy providing term insurance in the amount of $56,000.00. This policy was placed with The Manhattan Life Insurance Company through its general agent, Richard M. Grosten [p. 179, line 11, to p. 181, line 3].

In December 1953 and January 1954 [p. 172, line 10, to p. 173, line 3; p. 158, line 21, to p. 164, line 13], Mr. Koff had two or three meetings with Mr. Cobin, at one of which he testified *Mrs. Cobin* was present [p. 161, lines 1-6]. At their first meeting, Mr. Cobin outlined the insurance for which he had made application through Mr. Bloome and asked Mr. Koff how he thought it fit into his overall insurance program [p. 164, lines 12-24]. After reviewing the matter, Mr. Koff told Mr. Cobin that he could get the same benefits by simply converting

his "term" insurance with the Manhattan Life Insurance Company to an "ordinary" policy of insurance rather than accepting the new policy which he had applied for with appellee [p. 165, lines 8-24; p. 167, line 8, to p. 169, line 14].

Mr. Koff then informed Mr. Grosten that Mr. Cobin had applied for insurance with appellee and sought the best way to convince Mr. Cobin that it would be more to his advantage to convert his Manhattan policy than to accept the Midland Mutual policy [p. 165, lines 8-22]. On December 29, 1953, Mr. Grosten wrote a letter to Mr. Koff outlining the advantages of the Manhattan policy over appellee's proposed policy, which Mr. Koff showed to and discussed with Mr. Cobin [Deft. Ex. F; p. 172, line 10, to p. 173, line 3]. Mr. Koff then referred Mr. Cobin to Mr. Grosten for further discussions [p. 176, lines 12-20].

Mr. Grosten telephoned Mr. Cobin and again outlined the benefits of the Manhattan policy [p. 183, line 1, to p. 185, line 17], after which Mr. Cobin arranged a meeting between his attorney, Mr. Emmer and Mr. Grosten and himself. This meeting took place sometime in the middle of February 1954 [p. 185, line 18, to p. 187, line 20; Deft. Ex. G]. At this meeting Mr. Grosten pointed out that he and Mr. Koff had given Mr. Cobin good service which reflected credit on the Manhattan Life Insurance Company [p. 187, line 14, to p. 189, line 4] and that rather than discussing particular kinds of policies, they should consider Mr. Cobin's insurance needs in general [p. 193, line 9, to p. 194, line 10]. Mr. Koff also apparently discussed the matter with Mr. Cobin even after Mr. Cobin had submitted to the medical examination [p. 170, line 8, to p. 171, line 24].

At the trial Mrs. Cobin not only denied that she had had any conversations with Mr. Koff concerning the Midland Mutual policies but also denied that she knew

of any conversations on the subject between her husband and Mr. Koff [p. 71, line 14, to p. 72, line 23]. In addition to Mr. Koff's testimony that Mrs. Cobin was present at at least one of his meetings with Mr. Cobin [p. 161, lines 1-6], Mrs. Cobin's position was also impeached by her own testimony as contained in a deposition taken prior to the trial [p. 72, line 24, to p. 77, line 4]. It was thus established that Mr. Cobin not only considered withdrawing his application with appellee after he had executed Part I on December 14, 1953, but also after he had taken his medical examination on January 28, 1954.

On February 11, 1954 [Pltf. Ex. 9], appellee issued two $25,000.00 Preferred Life at 85 policies of insurance, one on the life of Mrs. Cobin [Pltf. Ex. 6] and one on the life of Mr. Cobin [Pltf. Ex. 5]. As indicated both on the face of the policies and in Question 19 of the respective applications [Pltf. Exs. 1 and 3], Mrs. Cobin's policy was dated as of February 6, 1954, and Mr. Cobin's policy was dated as of January 24, 1954. This was done at Mr. and Mrs. Cobin's request and in order to avoid an age change which would have occurred had the policies been dated February 11, 1954, which in turn would have required higher premiums to have been paid by the Cobins on each policy [p. 112, line 13, to p. 113, line 5; p. 384, lines 11-15].

Part I of Mr. Cobin's application [Pltf. Ex. 1] provides in part as follows:

> "This application is an offer by me for a contract of insurance, and if a deposit is made by me at the time of making this application, the insurance applied for shall not be effective unless and until the Company accepts this application *without change* at its Home Office, but if no such deposit is made, the policy, if issued, shall not take effect unless and until delivered and the full first premium paid

while I am in good health. *If the Company should issue a policy different from that hereby applied for,* or if apparent errors or omissions are found in this application, *the Company is authorized to amend this application in the space 'For Home Endorsements Only,'* and my *acceptance* of any policy issued on this application as changed shall constitute my ratification of such changes or additions, except that if required by the applicable State statute or regulations, any change as to amount, classification of risk, plan of insurance, or benefits shall be effective only upon my written agreement thereto." (Emphasis added.)

As indicated in Question 12 of their respective applications entitled "Insurance applied for:" [Pltf. Exs. 1 and 3], Mr. Cobin and Mrs. Cobin each applied for a "$25,000.00 Preferred Life to 85" policy of insurance. Nothing was stated in this space in either policy indicating that any other than the usual, non-rated policy was being applied for, and it is, consequently, clear that the applications were for insurance to be issued at standard premium rates [p. 310, lines 2-26]. Mrs. Cobin's policy, in fact, was issued at standard premium rates, and it is admitted that her policy was issued as applied for. It should also be noted in this connection that no change was recorded by appellee in Question 19 of her application entitled "For Home Office endorsements only" as would have been required by the provisions of the application above set forth had the policy not been issued as applied for [Pltf. Ex. 3]. On the other hand, Mr. Cobin's policy was not issued as applied for. It was "rated" at a Special Class A premium rate which called for higher than normal premiums. This fact was recorded by appellee in Question 19 of Mr. Cobin's application entitled "For Home Office endorsements only" by the insertion of the words "Insurance issued Special Class

A" [Pltf. Ex. 1; p. 112, lines 8-19]. In accordance with the provisions of Mr. Cobin's application above quoted and contrary to appellant's contention, Mr. Cobin's policy therefore was not effective and did not constitute a contract unless and until he accepted the policy since it differed from the one for which he had made application.

After the policies were issued, they were sent to Sam Van Elgort's agency office where they were received on Friday, February 12, 1954 [p. 294, lines 20-22]. When the policies were received, Mr. Van Elgort remitted Mr. and Mrs. Cobin's $130.00 deposit from his trust account to appellee's Home Office [p. 294, lines 2-7]. On Monday, February 15, 1954, Mr. Bloome picked up the policies and telephoned Mr. Cobin. Mr. Cobin told Mr. Bloome that he was busy and asked Mr. Bloome to bring the policies to his home [p. 108, lines 9-25; p. 294, lines 8-25; p. 232, line 19, to p. 233, line 8].

Two days thereafter, on February 17, 1954, Mr. Bloome met Mr. and Mrs. Cobin at their home where he attempted to "place" the policies. At this meeting Mr. Cobin told Mr. Bloome that he had been talking with his attorney, Mr. Emmer, and with "other insurance people" regarding the insurance. While he took possession of the policies, Mr. Cobin also told Mr. Bloome that he could not accept the policies until he had talked with his attorney further and that he would inform Mr. Bloome of his decision in this regard in a day or two. At this time, the words "Not Taken Mar. 3, 1954" were not stamped on the face of each policy [p. 109, line 3, to p. 111, line 7; p. 233, line 9, to p. 236, line 4].

On February 18, 1954, Mr. Bloome telephoned Mr. Cobin. Mr. Cobin stated that he didn't have an answer as he had not yet talked with his attorney, but that he had an appointment with Mr. Emmer and Mr. Grosten and would let Mr. Bloome know the following day [p.

113, lines 6-20]. Although Mrs. Cobin categorically denied this sequence of events, Mr. Bloome's testimony was substantiated by Mr. Grosten who testified that such a meeting had taken place [p. 185, line 18, to p. 189, line 4; p. 193, line 9, to p. 194, line 10] and by the letter Mr. Grosten wrote to Mr. Cobin on February 24, 1954, referring to such meeting [Deft. Ex. G].

On Friday, February 19, 1954, Mr. Bloome met with Mr. and Mrs. Cobin at their home. At this meeting Mr. Bloome testified that Mr. Cobin stated that he did not want either policy since his attorney had told him that he did not need additional insurance. Both policies, *together with the original deposit receipts,* were then returned to Mr. Bloome [p. 113, line 21, to p. 119, line 5; p. 236, line 5, to p. 238, line 13]. On the following Monday, February 22, 1954, Mr. Bloome delivered the policies to his agency office and requested that they be returned to appellee's Home Office in Ohio as "not taken" policies [p. 119, line 19, to p. 120, line 9; p. 312, line 22, to p. 313, line 22]. On the same day, Mr. Van Elgort sent the policies to appellee's Home Office with his letter requesting that the deposit on the first month's premium be refunded [Deft. Ex. I; p. 277, line 12, to p. 278, line 11; p. 284, line 23, to p. 285, line 10; p. 315, lines 10-21]. Mr. Bloome did not receive a commission for either of the policies issued to Mr. and Mrs. Cobin [p. 285, lines 16-19] and on March 3, 1954, Fred E. Stewart, employed by appellee at its Home Office, stamped the following words on both of the policies: "Not Taken. Mar. 3, 1954" [p. 318, line 1, to p. 339, line 4]. Mr. Cobin died quite unexpectedly on March 5, 1954.

The meeting of February 19, 1954, was, of course, the crucial meeting between Mr. Cobin and Mr. Bloome. In an effort to explain the undeniable circumstance that the policies were in appellee's possession on the day of

Mr. Cobin's death, Mrs. Cobin took two different positions with respect to this meeting. In her original verified complaint she denied that such meeting had ever taken place and alleged that Mr. Cobin had orally accepted the policies but had requested that Mr. Bloome keep them in his possession [Clk. Tr. p. 2, lines 16-24]. At the trial, after Mr. Bloome's deposition had been taken and it was discovered that the policies at one time had actually been delivered into Mr. Cobin's possession, Mrs. Cobin not only admitted that the meeting of February 19th had taken place but also claimed that she had been present at this meeting. She then testified that the reason the policies were in appellee's possession when Mr. Cobin died was that he had returned them to Mr. Bloome on February 19th with the request that her policy be cancelled and his increased in amount from $25,000.00 to $50,000.00 [p. 18, line 1, to p. 20, line 8; p. 52, lines 8-24; p. 56, line 1, to p. 59, line 22]. Mrs. Cobin also denied seeing the deposit receipts [Deft. Exs. A and B] at this meeting although they, too, were in appellee's possession when Mr. Cobin died [p. 59, lines 13-17].

It cannot be questioned that Mrs. Cobin changed her position with respect to the February 19th meeting only after Mr. Bloome's deposition was taken and she learned that the policies had at one time been in her husband's possession. This was, in fact, one of the grounds upon which she relied in her original motion to file an amended complaint [Clk. Tr. p. 9] as set forth in the affidavit of Mr. Horwin in support thereof. Apparently by an oversight, Mr. Horwin's affidavit was not included in the Clerk's Transcript of Record, but because of its significance in this regard as well as with respect to appellant's contention that the trial court erred in denying her original motion to amend, it is set forth in full in the Appendix to this brief.

On March 9, 1954, four days after Mr. Cobin died, appellee's Home Office mailed a premium notice to Mr. Cobin informing him that a monthly premium of $66.00 would be due on March 24, 1954 [Pltf. Ex. 10; p. 24, line 10, to p. 25, line 13]. This evidence, appellant argued at the trial, indicated that appellee considered Mr. Cobin's policy to be in force on March 9, 1954, and therefore on the date of his death.

In rebuttal of this argument, appellee introduced evidence of the circumstances surrounding the sending of the premium notice. In this regard Mr. Fogg, employed in the Accounting Department at appellee's Home Office, testified that 15,842 premium notices were prepared and mailed by appellee during the period between February 15, 1954, and March 15, 1954 [p. 375, lines 5-7]. Because of the great number of notices, they are prepared mechanically considerably in advance of the premium due date by means of IBM tabulating equipment. The procedure involves 56 separate steps and takes over a week to complete. The notices themselves are prepared in three groups or "cycles." The third cycle includes notices for those policies having premiums becoming due between the 20th and the last day of the next following month. Each cycle is started approximately one month before the due dates so that the notices can be mailed to the policyholder not less than 15 days prior to the due date. Once the process is commenced for any one group of notices, all are carried through the entire procedure [p. 346, line 3, to p. 349, line 25].

Mr. Cobin's policy provided for monthly premiums. Therefore, assuming it had been in force, a premium would have become due on March 24, 1954. Accordingly, the process of preparing the notice that was sent to Mr. Cobin on March 9, 1954, was commenced during the week ending February 24, 1954 [p. 355, lines 1-11],

which was prior to the time appellee's Home Office had notice that Mr. Cobin had refused to accept his policy. In fact, appellee's accounting department which prepares the premium notices, did not learn that Mr. Cobin had rejected his policy until March 10, 1954 [p. 367, line 13, to p. 370, line 8; p. 372, lines 5-12]. Moreover, once the process of preparing the premium notice which was sent to Mr. Cobin was started, it was not possible to withdraw it from the group of notices being prepared [p. 375, line 25, to p. 376, line 10; p. 384, line 11, to p. 385, line 11].

Mr. Bloome first learned of Mr. Cobin's death on March 8, 1954 [p. 120, line 11, to p. 121, line 1]. Mr. Bloome testified that after the funeral he met Mrs. Cobin on three or four separate occasions. The first was in the nature of a sympathy or courtesy visit. The others occurred at approximately weekly intervals thereafter, the final one being in the latter part of March, 1954. The purpose of these visits was to sell Mrs. Cobin life insurance. In connection with these visits Mr. Bloome also sought to help Mrs. Cobin with her other policies. Mr. Bloome was not successful in his attempt to sell Mrs. Cobin additional insurance, for she declined to reapply to appellee for a policy on her life. Significantly, Mrs. Cobin did not, at any of these meetings, mention the policies that had been returned to appellee or inquire in any way about the status of Mr. Cobin's policy [p. 121, line 4, to p. 126, line 12]. At this time Mr. Bloome also told Mrs. Cobin that appellee was in the process of returning the $130.00 deposit but that the agency office was in some doubt as to whom the money should be paid in view of Mr. Cobin's sudden death [p. 125, line 13, to p. 126, line 12].

Mrs. Cobin, on the other hand, could not recall any conversation with Mr. Bloome in which he attempted to sell her life insurance [p. 83, line 20, to p. 84, line 5]. She did admit, however, that she had met Mr. Bloome on three occasions shortly after her husband's death and that, notwithstanding the fact that the subject of insurance was discussed, she had not inquired as to what had happened to the additional $25,000.00 application that her husband had supposedly requested or even asked whether Mr. Cobin's policy was going to be paid [p. 402, line 21, to p. 405, line 13; p. 80, line 15, to p. 82, line 18]. Of great significance in this regard is the further admission of Mrs. Cobin that she made no claim of any kind to appellee with respect to the policy claimed to exist on her husband's life until August 25, 1954, almost 6 months after his death [p. 82, line 19, to p. 83, line 17; Pltf. Ex. 13].

On March 30, 1954, Mr. Van Elgort wrote to Mrs. Cobin and inquired, in view of Mr. Cobin's death, whether appellee's check returning the $130.00 deposit should be made payable to her or to Mr. Cobin's estate [Pltf. Ex. 11]. After receiving no reply, Mr. Van Elgort forwarded a check for $130.00 to Mrs. Cobin on April 16, 1954, payable to the order of Louise Cobin and the estate of Leo Cobin [Pltf. Ex. 12; p. 287, lines 4-19]. Mrs. Cobin admitted receiving this check [p. 402, lines 13-15]. The trial court found that under the circumstances, appellee had returned the deposit to appellant promptly and by the use of reasonable diligence [Clk. Tr. p. 29, line 23, to p. 30, line 3].

SUMMARY OF ARGUMENT.

While appellant seeks to classify all of the issues on this appeal as legal and argues that the District Court's findings of fact are erroneous as a matter of law, appellee contends that two questions are presented on this appeal, only one of which presents matters of law. The first is whether the evidence supports the District Court's findings of fact to the effect that appellee did not accept Mr. Cobin's application for insurance but instead modified it and issued a policy calling for higher than normal premiums and that, prior to his death, Mr. Cobin refused to accept and did reject the policy as issued. The second is whether the District Court erred in admitting certain evidence at the trial. It is only with respect to this latter issue that questions of law arise.

Appellee's argument to each of these issues is two-fold. With respect to the first issue, appellee first contends that the evidence supports the District Court's findings and that, therefore, the District Court was correct in concluding that no insurance was in effect on Mr. Cobin's life on the date of his death. In the second place, and only as an alternative argument, appellee contends that the evidence shows that the policy, assuming it to have been in force when issued by appellee, was rejected by Mr. Cobin and returned to appellee for cancellation and that, prior to his death, the policy was in fact cancelled with the consent of both parties.

With respect to the second issue, appellee contends that no error was committed by the District Court in admitting the evidence objected to by appellant since the objections were either not well taken or were based on the assumed fact that a contract existed, the very fact that was in dispute at the trial. Finally, appellee contends that if there was error committed in admitting certain evidence, it was not prejudicial and did not result in a miscarriage of justice and, therefore, that the District Court's judgment should be affirmed.

ARGUMENT.

I.

The Findings of Fact With Respect to the Issues Involved Are Sufficient and Are Supported by the Evidence.

Appellant's attack upon the judgment of the trial court is basically upon the findings of fact and the supporting evidence. Much of her brief is devoted to argument of the evidence and the inferences to be drawn therefrom. More difficult to deal with is the fact that appellant has stated that to be true which is not supported by the evidence or which has been specifically found to be untrue by the trial court. Appellant's attack in this connection must fail, for the findings of fact made by the trial court are both sufficient and supported by the evidence.

A. A Judgment Will Not Be Reversed on the Ground That the Evidence Is Insufficient to Support the Findings Where There Is Substantial Evidence in the Record.

The rules of law with respect to the review of the evidence by the appellate court are well established and need but brief reference. Where there is substantial evidence supporting the determination of the trier of fact, the appellate court will not reverse the judgment on the ground that the evidence does not support the findings of fact.

Nichols v. J. J. Newberry Co., 150 F. 2d 15 (9th Cir., 1945);

Super Mold Corp. of California v. Bacon, 130 F. 2d 860 (9th Cir., 1942).

On appeal, the evidence will be viewed in the light most favorable to the party who prevailed below and

every reasonable inference will be made in favor of the findings of the trial court.

Pasadena Research Laboratories v. United States, 169 F. 2d 375, 380 (9th Cir., 1948);

United States v. Aspinwall, 96 F. 2d 867 (9th Cir., 1938);

Inland Power & Light Co. v. Grieger, 91 F. 2d 811 (9th Cir., 1937).

As was stated in *Ross v. British Yukon Navigation Co.,* 188 F. 2d 779 (9th Cir., 1951), at page 782:

> "We must assume that all conflicts in the evidence were resolved against appellants and in considering the question of sufficiency of the evidence to sustain the verdict we look to the view thereof which is most favorable to appellee and we are obliged to accept as established all facts which have reasonable support in the evidence. Appellee is entitled to all inferences which may be reasonably drawn from the circumstances in evidence."

Equally established is the rule that the appellate court will not weigh the evidence. Questions of credibility are for the trial court.

Adolfson v. United States, 159 F. 2d 883 (9th Cir., 1947);

Suetter v. United States, 140 F. 2d 103 (9th Cir., 1944).

In the case at bar, the trial court specifically found that Mr. Cobin applied for a policy to be issued at standard premium rates [Clk. Tr. p. 28, lines 2-10]; that the policy issued by appellee was not issued as applied for since it was not issued at standard premium rates but rather at a Special Class A premium rate which called for higher than the standard premiums [Clk. Tr. p. 29, lines 4-9]; and that when the policy issued by appellee

was offered to Mr. Cobin, he refused to accept it and returned it to appellee for cancellation [Clk. Tr. p. 29, lines 11-21]. These findings are abundantly supported by the record.

B. There Is Substantial Evidence to Support the Finding That Mr. Cobin Applied for a Policy to Be Issued at Standard Premium Rates.

The District Court found that Leo Cobin applied for a Preferred Paid-Up Life at age 85 policy of insurance, said policy to be in the face amount of $25,000.00 and to be issued at standard premium rates [Clk. Tr. p. 28, lines 2-10]. Appellant's first argument for reversal is that this finding is without evidentiary support and "is negatived by the overwhelming weight of the evidence" (A. O. B.* pp. 19-21). In support of this argument, appellant makes the following statements of fact, which she contends are supported by the record:

1. Mrs. Cobin testified that her husband wanted a substandard A rating and that Mr. Bloome told Mr. Cobin he felt sure appellee would give him such rating.
2. Mr. Bloome knew that all of Mr. Cobin's existing insurance was rated.
3. The following words were incorporated in Part I of Mr. Cobin's application: "Present rating on most recent *policies* Substandard A."
4. The sum of $69.58 appears on the face of Part I of Mr. Cobin's application under Question 20.
5. The monthly premium for Mr. Cobin at standard rates would have been $59.50.

Appellant argues that these facts compel the conclusion that Mr. Cobin applied for a substandard policy. Appellant, however, has omitted all reference to the evidence

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which is unfavorable to her position and, in part, has incorrectly summarized the evidence presented to the trial court.

The first item of evidence relied upon by appellant is her testimony that her husband wanted a substandard A rating and that Mr. Bloome told Mr. Cobin he felt sure appellee would give him such rating. While it is true that appellant so testified [p. 41, lines 9-24], appellant has omitted reference to Mr. Bloome's testimony to the contrary in which he stated that Mr. Cobin only wanted to make application for an ordinary life policy [p. 93, lines 5-18; p. 138, line 19, to p. 139, line 25]. At best, therefore, a conflict in the evidence was presented which was resolved against appellant by the trial court.

The second and third items of evidence relied upon by appellant have been incorrectly stated. Appellant claims that Mr. Bloome knew that all of the existing insurance on Mr. Cobin's life had been issued at substandard rates and that Mr. Bloome wrote on Mr. Cobin's application, "Present rating of most recent *policies* Substandard A." Mr. Bloome did not so testify. He testified only that he knew that *some* of the policies were substandard [p. 129, lines 14-24]. Moreover, the application of Mr. Cobin does not refer to "policies" but rather to a single "policy" as having been rated [Question 11; Pltf. Ex. 1].

More important in this regard is Part I of the application itself [Pltf. Ex. 1]. Question 6 asks whether the applicant ever had any insurance that was "rated up." This question was answered "yes." Question 11 states, "If answer to Questions 6, 7, 8 or 9 is 'yes,' state full particulars here." Mr. Bloome then filled in the following: "6. Present rating on most recent *policy* Substandard A." It is quite clear that this is merely a recital of fact given in response to Question 6 and is

not, as appellant implies, a request for a policy with a substandard rating.

Appellant has completely omitted reference to Questions 12 and 18. Question 12 is entitled "Insurance applied for:" following which were inserted the words, "Preferred Life to 85." Question 18 is entitled "Special requests, etc." but was left blank. These are the only parts of the application involving in any way the kind or type of insurance for which application was made, yet nothing was there included indicating that any other than the usual, non-rated policy was being applied for. Furthermore, Mr. Cobin's application in this regard was exactly the same as Mrs. Cobin's [Pltf. Ex. 3; Questions 12 and 18] and it is admitted that Mrs. Cobin's application was for a policy to be issued at standard premium rates. Her policy, in fact, was issued at standard rates.

The only other reference in Mr. Cobin's application to substandard insurance is contained in space 19 entitled, "For Home Office endorsements only." Then follows the notation, "Insurance issued Special Class A." These words were inserted at appellee's Home Office [p. 112, lines 8-19] in accordance with the last sentence of the printed portion of Mr. Cobin's application providing that if appellee issued a policy different from that applied for, the modification should appear as such in Question 19. In this regard, the application provides:

> "If the Company should issue a policy different from that hereby applied for . . . the Company is authorized to amend this application in the space 'For Home Endorsements Only', and by acceptance of any policy issued on this application as changed shall constitute my ratification of such changes or additions. . . ."

Appellant next argues that since the monthly premium for Mr. Cobin at standard rates would have been $59.50

versal is that this finding "is in direct opposition to the evidence adduced" (A. O. B. pp. 21-22).

This argument is nothing more than a restatement of appellant's first argument for reversal, *i.e.*, that there is no evidence to support the finding that Mr. Cobin applied for an ordinary, non-rated policy. Appellant again contends that the reference to a substandard A policy in Question 11 of Mr. Cobin's application [Pltf. Ex. 1] indicates that Mr. Cobin applied for a rated policy. As pointed out in Section I. B. of this brief, the answer to Question 11 is merely a recital of fact given in response to the question asked in Question 6. As such it in no way referred to the type of policy being applied for by Mr. Cobin and the District Court was justified in so finding.

Appellant also states that Mr. Bloome asked for a premium payment of $69.52 rather than $59.50 which would have been called for had Mr. Cobin applied for a standard rating. Again, this argument was made by appellant in its first point for reversal and was answered by appellee in Section I. B. of this brief. Briefly put, the fact is that Mr. Bloome did not ask for $69.52 but rather for $72.50. The latter amount was the difference between the deposit on Mrs. Cobin's policy and the Cobin's check for $130.00. The sum of $72.50 was entered on Mr. Cobin's deposit receipt for convenience since the $130.00 amout was not meant to be exact. The figure of $69.52 was not entered on the face of Mr. Cobin's application by Mr. Bloome but rather was entered by the cashier at Mr. Bloome's agency office. The figure is completely unrelated to any other fact in this case and was obviously a miscalculation on the part of the cashier.

Appellant next contends that since Mr. and Mrs. Cobin's $130.00 deposit was remitted to appellee's Home Office by Mr. Van Elgort when the policies were first received, Mr. Cobin's application must have been for a substandard policy for otherwise there would have been

no authority to remit a premium based on a Special Class A rating. Such argument is not compelling in view of Mr. Van Elgort's immediate request to return the deposit after learning that Mr. Cobin had refused to accept the policies [Deft. Ex. I; p. 277, line 12, to p. 278, line 11; p. 284, line 23, to p. 285, line 10].

In further support of her argument, appellant states that an inter-office communication dated February 11, 1954, between two of appellee's officials [Pltf. Ex. 9] shows that the application of Mr. Cobin was approved "as made." This is a gross misstatement of the evidence as a review of the exhibit in question will demonstrate. The document only states that, "We have now been able to complete these applications and they have been approved today." Mr. Cobin's application shows on its face in Question 19 that appellee did not approve the application "as made" but instead modified it with the notation, "Insurance issued Special Class A" [Pltf. Ex. 1].

Appellant's final contention in support of her second argument for reversal is that there is not "a scintilla of evidence" that Mr. Cobin ever objected to the issuance to him of a substandard policy. This argument is completely beside the point for under appellee's theory Mr. Cobin refused to accept the policies on the ground that his attorney had told him that he did not need additional insurance [p. 113, line 21, to p. 114, line 10; p. 236, line 5, to p. 237, line 18]. The question of the premium rate, therefore, was not in issue and there was no reason to discuss it [p. 235, lines 1-13].

Appellant's second argument for reversal is the same as her first and is to the effect that the uncontroverted evidence is "irreconcilable" with the trial court's finding that Mr. Cobin applied to appellee for a non-rated policy of insurance. Appellee met this argument in detail in the preceding section of this brief (Sec. I. B.), and no useful purpose would be served to repeat it here. The

conclusion, however, is the same: From appellant's standpoint the evidence is, at best, conflicting. The District Court resolved the conflicts in appellee's favor, and it is clear that the court's determination finds abundant support in the record.

D. There Is Substantial Evidence to Support the Finding That Mr. Cobin Refused to Accept the Policy Offered by Appellee and That He Returned the Same to Appellee for Cancellation.

The District Court found that in the middle part of February, 1954, appellee offered the policy of insurance as issued to Leo Cobin, but that Leo Cobin refused to accept and did reject said policy of insurance and returned the same to appellee for cancellation [Clk. Tr. p. 29, lines 11-21]. Appellant's third argument for reversal is an attack on this finding (A. O. B. pp. 23-32), the exact basis of which is not clear. Appellant implies in the title to her argument that the finding is erroneous because of the "uncontroverted evidence." In the last sentence of her argument, however, appellant concludes that the finding is erroneous "as a matter of law." The body of appellant's argument consists of a conglomeration of points and doctrines, not one of which is applicable to the case at bar.

The key to appellant's argument, perhaps, is found in the first paragraph of her brief on page 23. There she states most emphatically that the District Court erred because it failed to recognize "that appellee, having accepted Mr. Cobin's application at its home office and having issued its policy, had caused, at that moment, a completed contract of insurance to come into existence." From this premise appellant then argues that neither delivery of the policy to nor acceptance of the policy by Mr. Cobin was necessary to give effect to the contract of insurance. Appellant's reasoning is fallacious for the

simple reason that the major premise employed assumes as established the very facts which the District Court found were not true, *i.e.,* that by approving Mr. Cobin's application appellee accepted Mr. Cobin's offer to purchase insurance. As pointed out above, the District Court expressly found that appellee did not accept Mr. Cobin's offer but in fact modified his application and issued a policy different from the one for which he had applied [Clk. Tr. p. 29, lines 4-9].

To the extent that appellant's third argument for reversal begs the question by assuming that the policy issued by appellee was the same as the one Mr. Cobin applied for, it is but a restatement of her first two arguments for reversal and needs no further answer here. For two reasons, however, rebuttal is appropriate to appellant's contention that the District Court erred as a matter of law in finding that Mr. Cobin refused to accept the policy as issued. First, the case law relied upon by appellant is not applicable to the facts of this case, and second, there is, in fact, substantial evidence to support the District Court's finding.

1. The Case Law Relied Upon by Appellant Is Not Applicable to the Facts of This Case.

On pages 25, 30 and 31 of her brief appellant cites fifteen cases in support of the principle that neither delivery of the policy to nor acceptance of the policy by the applicant is essential to create a contract of insurance where the first premium is paid and the insurer accepts the application. Not one of these cases, however, is in point on this appeal.

In the first place, many of the cases relied upon by appellant have no factual application at all to the case at bar. For example, appellant relies upon *Fageol T. & C. Co. v. Pacific Indemnity Co.,* 18 Cal. 2d 731, 117 P. 2d 661 (1941). This case involved automobile insur-

ance, not life insurance, and the court expressly stated that California law was not applicable as the events occurred in Washington (p. 737). There the purchaser of a truck under a conditional sales contract applied for and was issued a policy of collision insurance which was payable "as interests may appear." It is well established that in this kind of insurance the proceeds of the policy are payable in proportion to the equities of the conditional seller and purchaser as they exist on the date of the loss. After the truck had been damaged, the seller brought suit to recover on the policy. The insurer denied liability on the ground that the policy was never accepted by the seller. In dicta, which is the part relied upon by appellant, the court said that acceptance was not necessary since there was a *custom and practice* established in this type of insurance which made it effective without acceptance (p. 739). The actual holding of the case, however, was simply stated by the court at page 740: "But the ingenious argument of appellant that Fageol (the seller) never accepted the policy is beside the point . . ." since, as the negotiations were between the insurer and the buyer, there was nothing for the seller to accept.

The case of *Penn. Threshermen, etc. Ins. Co. v. Carter,* 197 Va. 776, 91 S. E. 2d 429, also relied upon by appellant, is similarly distinguishable. There the court merely held that a policy of automobile insurance, renewing a previous policy, need not be delivered in order to be effective where the evidence showed that it was the company's custom to renew policies automatically and to extend credit for the first premium. It seems obvious that cases involving this kind of insurance have no bearing upon the principles applicable to life insurance. Such policies are issued only for a short period and are governed in large part by customs and practices not applicable to life insurance.

The cases relied upon by appellant for the proposition that acceptance of the policy by the applicant is not necessary to the formation of contract are distinguishable on a second and more significant ground. In each of the fifteen cases cited by appellant it appeared that the company, in accepting the application, issued a policy *exactly as applied for*. The decisions in these cases, therefore, go no further than holding that an application is an offer to purchase insurance and that a contract arises if and when the insurer accepts the offer by issuing a policy in the same terms as the application. Since the trial court found as a fact that appellee did not accept Mr. Cobin's application and did not issue a policy in the same terms as his application, it is clear that no contract of insurance came into existence by the mere "issuance" of a policy of insurance by appellee.

That the fundamental principles of contract law are applicable to life insurance contracts is a fact which has apparently been overlooked by appellant. As was stated by the California Supreme Court in *Linnastruth v. Mut. Benefit Etc. Assn.*, 22 Cal. 2d 216, 137 P. 2d 833 (1943), at page 219:

> "An application for insurance is a proposal. A meeting of the minds is essential. And the proposal is not a completed contract until it is accepted by the insurer in the same terms in which the offer was made. If the acceptance modifies or alters any of the terms of the proposal, it must then in turn be accepted by the applicant to be effective as a contract."

This principle was early established as the law of California in *Yore v. Bankers' Life Assn.*, 88 Cal. 609, 26 Pac. 514 (1891), where the court held at page 612:

> "A policy which in its terms is different from the application is not a completed contract, and until accepted by the insured is no more than a proposal to contract, upon the terms stated in it."

Accord:

Westerfeld v. New York Life Ins. Co., 129 Cal. 68, 74-76, 61 Pac. 667 (1900).

Where the issue has arisen in other jurisdictions, the law is the same:

Kinney v. Northern Life Ins. Co., 200 Wash. 190, 93 P. 2d 360 (1939);

McDonald v. Mut. Life Ins. Co. of N. Y., 108 F. 2d 32 (1939);

Morford v. Western States Life Ins. Co., 166 Ore. 575, 113 P. 2d 629 (1941);

Kronjaeger v. Travelers Ins. Co., 124 W. Va. 730, 22 S. E. 2d 689 (1942).

Equally applicable to the case at bar are the cases holding that the insurer has no right to retain the premium submitted with an application where it issues a policy differing from the one specified in the application and the applicant refuses to accept the policy as issued. Under these circumstances no contract of insurance exists and the applicant is entitled to the return of the money tendered to the insurer.

La Marche v. New York Life Ins. Co., 126 Cal. 498, 58 Pac. 1053 (1899);

Firpo v. Slyter, 95 Cal. App. 500, 504, 272 Pac. 1111 (1928).

The trial court found that Mr. Cobin applied for a non-rated policy but that appellee issued a rated policy. Under the authorities above cited, appellee's action constituted both a rejection of Mr. Cobin's offer to purchase insurance at standard rates and a counter-offer to insure him at substandard rates. Mr. Cobin's acceptance of the policy offered, therefore, was absolutely necessary to the creation of a valid contract.

In addition to relying on case law, appellant also contends that the language of the Part I of Mr. Cobin's application obviated the necessity of a delivery to or acceptance by Mr. Cobin of the policy issued by appellee. The terms of Mr. Cobin's application, however, are entirely in accord with the District Court's conclusion that an acceptance by Mr. Cobin of the policy offered to him by appellee was a prerequisite to the formation of a contract. The application in effect states that it is an offer to purchase insurance; that no insurance shall be in effect unless and until the application is accepted without change by the Company at its Home Office; and that if a different policy is issued than the one applied for, the applicant's acceptance of the policy shall constitute his ratification of the change. The provision in question reads [Pltf. Ex. 1]:

> "I have read all of the foregoing statements, representations and answers and declare that they are each and all full, true and correct. If a policy is issued hereon, the complete application, Parts I and II, and such policy shall constitute the entire contract. This application is an offer by me for a contract of insurance, and if a deposit is made by me at the time of making this application, the insurance applied for shall not be effective unless and until the Company accepts this application without change at its Home Office, but if no such deposit is made, the policy, if issued, shall not take effect unless and until delivered and the full first premium paid while I am in good health. If the Company should issue a policy different from that hereby applied for, or if apparent errors or omissions are found in this application, the Company is authorized to amend this application in the space 'For Home Endorsements Only', and my acceptance of any policy issued on this application as changed shall constitute my

of a final contract or the termination of the temporary contract occurred.

Ostroff v. New York Life Ins. Co., 194 F. 2d 986 (9th Cir., 1939);

Standard Acc. Ins. Co. v. Winget, 197 F. 2d 97, 99 (9th Cir., 1952);

Ruklin v. New York Life Ins. Co., 304 U. S. 202, 205 (1938).

In *Leube v. Prudential Ins. Co.,* 72 N. E. 2d 76 (Ohio 1947), the issue presented by appellant's argument was squarely presented. There the applicant paid the first premium and received a receipt, the terms of which the court held gave rise to an immediate contract of temporary insurance. Ten days later the application was rejected by the company at its home office. Thereafter, but before notice of the rejection was given to the applicant, the applicant died. On these facts the court held that no contract of insurance existed after the application was rejected and that it was therefore error not to grant the insurer's motion for a directed verdict.

While this case involved an outright rejection, there is no question that the same rule would be applied where the insurer rather than rejecting the application, issued a different policy from that specified in the application. Such is clear from the fact that the court relied almost entirely on the case of *Corning v. Prudential Ins. Co. of America,* 288 N. Y. Supp. 661, affd. 8 N. E. 2d 338 (1937), where it appeared that the company issued a policy calling for a larger premium than the policy applied for. Before the new policy was offered to the applicant, the applicant died. Even though the policy had been sent to the soliciting agent, the New York court held that no contract of insurance was in existence. As the ground for its decision the court stated that the insurance was conditioned upon the company's approval, which

not only was never given, but was declined with reasonable promptness. As an additional reason for the decision, the court held that the substituted contract was never accepted by the applicant.

It is thus clear that under any theory no insurance existed on Mr. Cobin's life at the date of his death. If it be assumed that his application was merely an offer to purchase insurance, then the issuance by appellee of a policy which materially differed from the policy applied for constituted a counteroffer which under the general rules of the law of contracts amounted to a rejection of the application. If, on the other hand, it be assumed that Mr. Cobin's application gave rise to immediate insurance on a conditional basis the moment it was executed and a premium deposit made, then the issuance of a different policy by appellee amounted to a rejection of the application and the termination of the temporary insurance. Under either theory, Mr. Cobin's acceptance of the substituted policy was required for the ultimate formation of a contract of insurance.

Mutual Life Ins. Co. v. Young, 23 U. S. 85 (1875);

Mohrstadt v. Mutual Life Ins. Co., 115 Fed. 81 (8th Cir., 1902);

New York Life Ins. Co. v. Levy, 92 S. W. 325 (Ky. 1906);

Boswell v. Gulf. Life Ins. Co., 29 S. E. 2d 71 (Ga. 1944).

The facts presented in the case at bar are even stronger than those involved in the above cases, which hold that there is no existing contract where a policy differing from that applied for is issued even though the applicant is unaware of the change and has no opportunity to accept or reject the substituted policy. Here, the District Court found as a fact that Mr. Cobin refused to accept the

policy offered to him by appellee and returned it to appellee for cancellation. The evidence clearly supports this finding and shows that Mr. Cobin, for reasons intimate to himself, decided that he did not need or want the additional insurance.

2. The Evidence Supports the Finding That Mr. Cobin Refused to Accept the Policy Offered to Him by Appellee.

The policy on Mr. Cobin's life was admittedly issued. It was not, however, issued as applied for, but rather was issued as a "rated" policy requiring higher than standard premiums. If it is true, as the District Court found, that Mr. Cobin refused to accept the policy, for whatever reason, it is equally true that the policy was not in force at the time of his death. The question presented, consequently, is a factual one.

Silver v. New York Life Ins. Co., 116 F. 2d 59 (7th Cir., 1940).

The evidence supporting the District Court's finding that Mr. Cobin rejected the policy offered to him by appellee is outlined in detail in the part of this brief entitled "Statement of Facts" and is quite voluminous. It shows that after Mr. Cobin executed Part I of his application on December 14, 1953, he entertained grave doubt as to whether he wanted any additional insurance at all. He refused for seven weeks to take a physical examination or complete Part II of his application. Mr. Bloome testified that during this period Mr. Cobin told him that he was conferring with his attorney and other insurance salesmen regarding his application to appellee and "until he found out further, one way or the other, he wasn't going in for the examination." [P. 103, line 6, to p. 104, line 2].

Finally, in the latter part of January, 1954, Mr. Bloome told Mr. Cobin that he had received a letter from ap-

pellee's home office [Pltf. Ex. 16] stating that his application was being withdrawn from consideration because of his refusal to submit to a medical examination [p. 104, line 17, to p. 105, line 4; p. 227, line 6, to p. 228, line 20]. Faced with this ultimatum, Mr. Cobin submitted to a physical examination and completed Part II of his application on January 28, 1954 [Pltf. Ex. 2].

While Mrs. Cobin testified that Mr. Cobin had never stated that he was not sure he wanted the insurance for which he had made application to appellee [p. 48, lines 4-8], both Mr. Koff and Mr. Grosten testified to the contrary. In December 1953 and January 1954 [p. 172, line 10, to p. 173, line 3; p. 158, line 21, to p. 164, line 13], Mr. Koff had two or three meetings with Mr. Cobin, at one of which he testified Mrs. Cobin was present [p. 161, lines 1-6]. At their first meeting, Mr. Cobin outlined the insurance for which he had made application and asked Mr. Koff how he thought it fit into his overall insurance program [p. 164, lines 12-24]. Mr. Koff told Mr. Cobin that he could get the same benefits by simply converting his existing term insurance with the Manhattan Life Insurance Company to an ordinary policy rather than accepting the new policy he had applied for with appellee [p. 165, lines 8-24; p. 167, line 8, to p. 169, line 14].

Thereafter both Mr. Koff and Mr. Grosten discussed insurance with Mr. Cobin [Deft. Ex. F; p. 170, line 8, to p. 173, line 3; p. 176, lines 12-20; p. 183, line 1, to p. 185, line 17]. The last meeting with Mr. Grosten took place in the middle of February, 1954, at the office of Mr. Cobin's attorney [Deft. Ex. G; p. 185, line 18, to p. 187, line 20].

On February 15, 1954, Mr. Bloome received the policies issued by appellee and on February 17, 1954, offered them to Mr. Cobin. Mr. Cobin took physical possession of the policies but said that he could not accept them until he had talked further with his attorney [p. 109, line 3, to p. 111, line 7; p. 223, line 9, to p. 236, line 4]. On February 19, 1954, Mr. Cobin returned the policies, together with the original deposit receipts [Deft. Exs. A and B], to Mr. Bloome and told him that his attorney had advised him that he did not need the additional insurance [p. 113, line 21, to p. 119, line 5; p. 236, line 5, to p. 238, line 13].

The policies, of course, were in appellee's possession at the time Mr. Cobin died. It was this circumstance that undoubtedly caused Mrs. Cobin to allege in her original verified complaint that the policies had never been physically delivered to Mr. Cobin [Clk. Tr. p. 2, lines 16-24] and then, after discovering that Mr. Cobin at one time had had possession of the policies, to testify that they were returned with the request that hers be cancelled and his increased in amount from $25,000.00 to $50,000.00 [p. 18, line 1, to p. 20, line 8; p. 52, lines 8-24; p. 56, line 1, to p. 59, line 22].

The force of all of the above evidence almost compels the conclusion that Mr. Cobin, after making application to appellee, decided that he actually did not need or want the additional insurance and therefore that he refused to accept the policies when offered to him by Mr. Bloome. In any event, the evidence is clearly sufficiently substantial to justify the District Court in so concluding.

E. The District Court Did Not Err in Declining to Find That Appellee's Consent to the Cancellation of the Policy Had to Be Communicated to Mr. Cobin.

The District Court also found that on April 16, 1954, appellee tendered to appellant the monies deposited with it at the time Leo Cobin executed Part I of his application, that the tender was refused by appellant and that the tender, under the circumstances of this case, was made promptly and by the use of reasonable diligence [Clk. Tr. p. 29, line 23, to p. 30, line 3]. Appellant contends that these findings are erroneous because "appellee had not effected any valid cancellation of the Policy during Mr. Cobin's lifetime" (1) since it had not communicated its consent to a cancellation of the policy to Mr. Cobin prior to his death and (2) since it had not restored the deposit it had received to Mr. Cobin prior to his death (A. O. B. pp. 32-42).

The primary fallacy of this contention is that it begs the question by assuming that a contract of insurance was in existence and was effective unless cancelled. Such premise has no factual basis since, as previously pointed out, the trial court specifically found that no contract of insurance ever arose between Mr. Cobin and appellee. For this reason alone, therefore, appellant's contention may be disregarded as unmeritorious.

Assuming, however, and only for the purpose of argument, that a contract of insurance was at one time in effect between Mr. Cobin and appellee, both the evidence and the trial court's findings show that it was cancelled by appellee at the request of Mr. Cobin. In this regard the trial court found that when the policy was offered to Mr. Cobin, he refused to accept it and returned it to appellee for cancellation [Clk. Tr. p. 29, lines 11-14]. As heretofore demonstrated, the evidence clearly supports this finding and shows that Mr. Cobin did not want the policy offered to him by appellee. It also shows

that Mr. Cobin manifested in every way possible his consent to the cancellation of the policy. It is uncontroverted that appellee also consented to the cancellation for on March 3, 1954, it caused the policy to be cancelled and stamped "Not Taken. Mar. 3, 1954." [p. 318, line 1, to p. 339, line 4]. This, of course, occurred prior to the death of Mr. Cobin and under the provisions of Section 1699 of *Civil Code of California,* extinguished the obligations of the contract. This statute provides:

> "The destruction or cancellation of a written contract, or of the signature of the parties liable thereon, with intent to extinguish the obligation thereof, extinguishes it as to all the parties consenting to the act."

One of the points made by appellant in support of her argument that no cancellation of the policy was effected during Mr. Cobin's lifetime is that, at most, Mr. Cobin merely offered to cancel the policy and appellee did not accept the offer since it did not communicate its acceptance to Mr. Cobin prior to his death. It must first be noted that this contention is directly opposite and contrary to the basic position taken by appellant with respect to the creation of a contract of insurance. In this respect she argues that Mr. Cobin's application was an offer to purchase insurance, that appellee accepted the offer by approving the application and issuing a policy, that a contract of insurance sprang into existence at the "very moment" that the policy was issued and that a communication of appellee's acceptance of Mr. Cobin's offer was, consequently, unnecessary.

Equally fatal to appellant's argument is the fact that she has improperly classified Mr. Cobin's conduct as an "offer" to cancel the policy. Such is not the case under any theory. A policy of life insurance is not a bilateral contract. It is a unilateral contract since the

policyholder incurs no duty to pay premiums. The company promises to continue the insurance in force so long as the insured pays his premiums, but the insured neither expressly nor impliedly promises to pay premiums. The insured, therefore, by his own act alone, can terminate the contract by simply refusing to pay premiums or by expressing his intent that the policy is to be terminated.

In the case at bar, Mr. Cobin expressed his intent that the policy was to be cancelled and in fact demanded the return of his deposit [p. 114, lines 21-22]. By the nature of things, appellee was in no position to refuse to cancel the policy since there was no obligation on the part of Mr. Cobin to continue the policy in force. There was, therefore, no "offer" for appellee to accept. To hold otherwise would be to require the doing of a useless and idle act which the law does not require (Civ. Code, Sec. 3532).

While appellee did not actually return the deposit monies to appellant until April 16, 1954, Mr. Bloome told Mr. Cobin, at the time Mr. Cobin gave him back the policies, that appellee would return the deposit [p. 114, lines 21-23]. Mr. Cobin died shortly thereafter and Mr. Bloome then attempted to have Mrs. Cobin reapply to appellee for insurance on her life. During these negotiations Mr. Bloome told Mrs. Cobin that appellee was in the process of returning the deposit but that the agency office was in some doubt as to whom the money should be paid in view of Mr. Cobin's sudden death. At this time Mrs. Cobin made no objection in this regard [p. 121, line 4, to p. 126, line 12]. When it became apparent that Mrs. Cobin did not wish to reapply to ap-

pellee for insurance, Mr. Van Elgort wrote to her and inquired whether the deposit should be returned to her or to Mr. Cobin's estate [Pltf. Ex. 11]. No reply was received and a check was then sent to Mrs. Cobin on April 16, 1954 [Pltf. Ex. 12; p. 287, lines 4-19; p. 402, lines 13-15]. Under these circumstances the District Court was justified in finding that the deposit was returned timely.

Appellant also cites several cases involving liability or indemnity insurance to support her contention that Mr. Cobin's life insurance policy was never effectively cancelled. Policies of liability insurance, however, are unlike life insurance contracts since they are issued for a specified premium and for a specified period of time. They also provide by their terms for cancellation by the company upon the giving of notice to the insured. Accordingly, the cases relied on by appellant hold only that no valid cancellation of such a policy is effected by the insurer until notice thereof is actually given to the insured. The principle of these cases has no application to the instant case which involves life insurance. Here, moreover, it was not appellee that sought to cancel the policy but rather the insured himself.

Appellee does not believe that the issue of cancellation is presented in this case since no subsisting contract ever existed between the parties and appellee so stated to the trial court [pp. 30-33]. Appellee did, however, raise the issue in its answer as an alternative contention [Clk. Tr. p. 24, lines 12-16]. It is pursued on this appeal in the alternative, it being appellee's primary position that no contract of insurance ever arose between it and Mr. Cobin.

F. The District Court Did Not Err in Concluding That No Contract of Insurance Existed Between Mr. Cobin and Appellee.

At pages 42 and 43 of her brief, appellant states that the District Court erred in concluding that no contract of insurance existed between appellee and Mr. Cobin and in failing to find that a policy of life insurance had in effect been issued and delivered to Mr. Cobin prior to his death. No argument is made in support of these contentions other than the reference to appellant's previous arguments which have heretofore been answered by appellee.

At the top of page 43, appellant sets forth the evidence favorable to her and in effect argues that the weight of the evidence is contrary to the trial court's findings. One statement by appellant requires comment. Appellant states that appellee's own record card shows that the policy lapsed March 10, 1954, five days after Mr. Cobin's death, the implication being that appellee considered the policy in force until March 10, 1954. It is true that the card bears the mark, "Lapsed, March 10, 1954" [Deft. Ex. M], but appellant has failed to set forth the testimony of the witness through whom the record card was introduced. He testified that the mark on this card indicated only that appellee's accounting department had received notice that Mr. Cobin had refused to take the policy on March 10, 1954, and that on that date had marked its records accordingly [p. 357, line 5, to p. 361, line 8; p. 367, line 13, to p. 371, line 7]. In truth, therefore, the notations relied on by appellant not only do not support her position but rather support the findings and conclusions of the District Court.

II.

The District Court Did Not Err in Its Rulings Made on the Admission of Evidence.

Appellant next contends that the District Court made several prejudicial errors in its rulings with respect to the admission of evidence. Appellant's contentions in this regard, however, are not well taken for they are based on an improper classification or misinterpretation of the character of the evidence offered.

A. The District Court Did Not Err in Admitting Parol Evidence of the Negotiations Between the Parties.

Appellant first argues that the trial court erred in admitting parol evidence of the negotiations between the parties because "a policy of insurance had been issued which contains no ambiguity, required no interpretation and had superseded prior negotiations" (A. O. B. pp. 46-55). This argument, like the parol evidence rule itself, presupposes that a valid and subsisting contract does in fact exist between the parties. As in her contentions with respect to the sufficiency of the evidence to support the findings, appellant again has assumed as true the very fact that was in issue at the trial, *i.e.,* whether a contract did exist.

It seems obvious that the parol evidence rule has no application to the situation here presented since the existence of a contract must be established before the rule is applicable, and here the court found that none existed. The applicable code section makes this clear by expressly excepting the situation, "Where the validity of the agreement is the fact in dispute" (Code Civ. Proc., Sec. 1856(2)).

By its terms Mr. Cobin's application was only an offer to purchase insurance. Appellee denied that this offer was ever accepted. It was held in *Lawrence v. Premier*

Indem. Assur. Co., 180 Cal. 688, 182 Pac. 431 (1919), that the parol evidence rule has no application to such situation. In this regard the court held at page 698:

> "So far as the 'parol evidence' rule goes, the essential distinction between a writing which purports to be a proposal merely and one which purports to be a contract of the parties is that the first does not purport to be the written memorial of both parties as to their understanding and the second does, with the necessary result that in the latter case, but not the former, the writing and nothing else is to be taken as expressing the contract."

Griffith v. Bucknam, 81 Cal. App. 2d 454, 458-459, 184 P. 2d 179 (1947);

Wise v. Collins, 121 Cal. 147, 150, 53 Pac. 640 (1898).

B. The District Court Did Not Err in Admitting the Testimony of Richard Grosten and Sam Van Elgort.

Appellant next contends that the trial court erred in admitting certain of the testimony of Mr. Grosten and Mr. Van Elgort (A. O. B. pp. 55-77). It is, however, impossible to determine the basis of appellant's contentions with respect to Mr. Grosten. Appellant states that he was allowed to testify to conversations he had with business associates of his own company (citing R. 183 and 180), but the record reveals that Mr. Grosten only testified to conversations he had with Mr. Cobin [p. 179, line 11 to p. 189, line 25].

This testimony was clearly relevant as it established that Mr. Cobin was in fact considering withdrawing his application for insurance to appellee even prior to the

time the policy was offered to him. It was also competent since it concerned admissions on the part of Mr. Cobin. In this connection, C. C. P. Section 1870 provides:

> ". . . evidence may be given upon a trial of the following facts . . .
>
> 2. The act, declaration, or omission of a party, as evidence against such party;
>
> 3. An act or declaration of another, in the presence and within the observation of a party, and his conduct in relation thereto; . . ."

While Mr. Cobin was not a party to the action, his admissions were admissible as against appellant, the beneficiary of the policy sued upon.

> *McEwen v. New York Life Ins. Co.*, 23 Cal. App. 694, 139 Pac. 242 (1914).

Appellant also contends it was prejudicial error to allow Mr. Van Elgort to testify that Mr. Bloome did not receive a commission on the policy issued to Mr. Cobin and to identify a letter he wrote to appellee's home office requesting the return of the money he sent to appellee when the policies were first received in his agency office [Deft. Ex. I]. This contention is not well taken. Both items of evidence showed a course of conduct on the part of appellee prior to trial which was consistent with the position it took at the trial, i.e., that Mr. Cobin had rejected the policy offered to him by appellee. On the other hand, appellant introduced certain evidence tending to show that appellee had conducted itself in a manner inconsistent with the position it took at the trial, for example, that appellee had mailed Mr. Cobin a premium notice after Mr. Cobin had returned the policies to Mr. Bloome.

Under such circumstances it is well established that where one party introduces evidence tending to show prior inconsistent acts or statements on the part of his adversary, the adversary may introduce evidence of prior consistent acts or statements in rebuttal and by way of rehabilitation.

Brickford v. Mauser, 53 Cal. App. 2d 680, 128 P. 2d 79 (1942);

Davis v. Tanner, 88 Cal. App. 67, 262 Pac. 1106 (1927).

Moreover, the letter of Mr. Van Elgort's [Deft. Ex. I], was also properly received to establish when appellee's home office received notice that the policies were being returned and as such did not constitute hearsay evidence.

Smith v. Whittier, 95 Cal. 279, 30 Pac. 529 (1892).

C. The District Court Did Not Err in Admitting the Testimony of Fred Stewart and Harold Fogg.

Appellant's next contention is that the trial court erred in admitting the testimony of Mr. Stewart and Mr. Fogg (A. O. B. pp. 57-64). Mr. Stewart's testimony, like the letter Mr. Van Elgort wrote on February 22, 1954 [Deft. Ex. I], tended to establish when appellee's home office first received notice that Mr. Cobin had rejected the policy offered to him. It also demonstrated that appellee "cancelled" the policy on March 3, 1954, two days before Mr. Cobin died [p. 318, line 1 to p. 339, line 4]. The testimony of Mr. Fogg explained the circumstances surrounding appellee's mailing a premium notice to Mr. Cobin on March 9, 1954. It showed that appellee's premium notice department did not know that Mr. Cobin's policy had been cancelled until March 10, 1954, and that

even if it had learned of such fact earlier, it would have been impossible to withdraw Mr. Cobin's notice because of the great number of notices sent out by appellee [p. 346, line 3 to p. 349, line 25; p. 367, line 13 to p. 376, line 10; p. 384, line 11 to p. 385, line 11].

Appellant argues that this evidence was improperly received because (1) it constituted evidence of appellee's general business custom or usage, uncommunicated to Mr. Cobin, which could not be admitted to alter the obligations of a contract, (2) it constituted hearsay and self-serving declarations, and (3) it was based on surmise and conjecture since appellee had no record of the premium notices sent to Mr. Cobin. This line of argument is groundless for it improperly classifies the character of Mr. Stewart's and Mr. Fogg's testimony.

It is true that appellee had no individual record concerning when premium notices were sent out with respect to Mr. Cobin's particular policy [p. 350, lines 16-23], but it was for this very reason that the District Court allowed Mr. Stewart and Mr. Fogg to base their testimony, at least in part, on the customary practices and usages employed by appellee in sending out premium notices. In this regard, evidence of the habit or custom of a business house of doing certain acts in the transaction of its business is admissible to prove that such act was done on a particular occasion and to explain the circumstances surrounding the doing of the act.

Hughes v. Pacific Wharf Co., 188 Cal. 210, 205 Pac. 105 (1922);

American Can Co. v. Agricultural Ins. Co., 27 Cal. App. 647, 150 Pac. 966 (1915);

Shearer v. Pac. G. & E. Co., 43 Cal. App. 2d 306, 309, 110 P. 2d 690 (1941).

It is quite clear that the testimony here involved was not elicited to establish the nature of appellee's business

customs and practices as an end in itself but rather was used as a basis to establish when and under what circumstances the premium notice of March 9, 1954, was sent to Mr. Cobin. In this respect it was but a form of circumstantial evidence and was properly admitted. The cases cited by appellant on pages 61 and 62 of her brief are relied upon for the proposition that evidence of custom or usage in the insurance business may not be used to vary the terms of a contract. Since neither the testimony of Mr. Stewart nor the testimony of Mr. Fogg concerned custom or usage as such, these cases have no application to the case at bar.

There can be no doubt either that this testimony was properly received to explain the circumstances surrounding the sending of a premium notice to Mr. Cobin on March 9, 1954. Appellant introduced the notice and testified to its receipt as part of her case in chief [Pltf. Ex. 10; p. 24, line 12 to p. 25, line 13]. This, appellant argued, constituted an act or declaration on the part of appellee indicating that Mr. Cobin's policy was in force on March 10, 1954 [p. 420, lines 16-25]. Since, however, appellant introduced this evidence as part of her case, appellee had the right to introduce evidence, by way of explanation, of all of the circumstances surrounding the sending of that premium notice. This is made clear by Code of Civil Procedure, Section 1854, which provides:

> "When part of an act, declaration, conversation, or writing is given in evidence by one party, the whole of the same subject may be inquired into by the other; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing, which is necessary to make it understood, may also be given in evidence."

This rule applies even though evidence of the surrounding circumstances is itself hearsay or self-serving.

Davis v. Sturgis, 142 Cal. App. 2d 840, 299 P. 2d 408 (1956);

Brooks v. Willig Truck Co., 40 Cal. 2d 669, 676, 255 P. 2d 802 (1953).

Similarly, to the extent that Mr. Stewart's and Mr. Fogg's testimony concerned when the home office of appellee first received notice that Mr. Cobin had refused to accept the policy offered to him, no hearsay or self-serving evidence was involved.

Smith v. Whittier, 95 Cal. 279, 30 Pac. 529 (1892).

D. The District Court Did Not Err in Admitting Evidence That Mrs. Cobin Had Conferred With an Attorney.

Appellant contends that on several occasions appellee attempted to elicit communications between Mrs. Cobin and her attorney and that the trial court erred in admitting evidence of such communications (A. O. B. pp. 64-68). In support of this contention, appellant quotes incomplete portions of the record which, appellant states, shows that the trial court "entertained little regard for the attorney client privilege."

There are several answers to this argument. In the first place, appellee did not seek to elicit the communications themselves but rather only the fact that a communication had occurred. This was made clear by appellee's counsel at several points in the record [p. 64, lines 19-20, 22-23; p. 396, lines 10-12]. While the communication itself may be privileged, the fact that a communication was made is not privileged. As was said in the *Estate of Pusey,* 180 Cal. 368, 181 Pac. 648 (1919), concerning the husband-wife privilege, "We think, therefore, that the purpose of the inquiry being to show the

act of communicating and not the disclosures involved in the communications, the testimony does not come within the inhibition of the statute."

Tanzola v. De Rita, 45 Cal. 2d 1, 7, 285 P. 2d 897 (1955);

Muller-Johnson Co. v. Penn. Mut. Life Ins. Co., 2 Fed. Supp. 203 (D. C. Cal., 1933).

This is also the rule in other jurisdictions where the issue has been raised. In *Sampson v. Sampson,* 112 N. E. 84 (Mass. 1916) it was held that both the fact that a conversation took place and the action taken by the party after the conversation were admissible, and further, that the court might properly draw inferences from the fact of the communication and the action taken as a result thereof.

Houghton v. Aetna Life Ins. Co., 73 N. E. 592 (Ind.);

Breisenmeister v. Supreme Lodge, 45 N. W. 977 (Mich.);

Price v. Standard Life, 95 N. W. 1118, 1120 (Minn.);

Patten v. United Life, 31 N. E. 342, 343, (N. Y.).

In the second place, even if it assumed that the questions propounded here sought to elicit, not the communications themselves, but the general subject matter of the communication, it was within the trial court's sound discretion to determine whether the question was improper under all of the circumstances.

Holm v. Superior Court, 42 Cal. 2d 500, 507, 267 P. 2d 1025 (1954).

In the case at bar, the questions involved no more than what was alleged by appellant as being true in her original verified complaint and later denied under oath at

the trial. As such, they related only to what was a matter of public record, and, in fact, part of the present proceedings.

Finally, it must be noted that appellant has carefully omitted certain portions of the record in setting forth the testimony claimed to be improper. Appellant refers to three groups of questions, the first of which refers to questions propounded Mrs. Cobin and which commence at page 63, line 12 and end at page 67, line 4 of the transcript. Appellant has quoted only a portion of this testimony [p. 64, line 5 to p. 65, line 21], and of this portion has not indicated that lines 3-8 on page 65 were omitted. This latter part established that the witness did not in fact answer the question. Moreover, if the whole portion of this record is read [to p. 65, line 21], it will be discovered that Mrs. Cobin never did testify with respect to any communications with her attorney.

The other two groups of questions referred to by appellant are in reality only one continuous line of questioning and relate to the testimony of Mr. Emmer [p. 395, line 5 to p. 399, line 17]. Appellant has not quoted, however, the portion of the record in which her own counsel asked Mr. Emmer the same type of question that she now claims appellee erroneously asked [p. 397, lines 7-12].

When the whole record is read, it is clear that the trial court did not err in allowing appellee to establish that Mrs. Cobin did in fact confer with her attorney prior to the filing of her original verified complaint. The fact that the communication took place was not privileged and demonstrated that Mrs. Cobin completely reversed her position after learning that her husband actually received physical possession of the policies for a short period. Moreover, to the extent that her own counsel asked a similar question of Mr. Emmer, appellant waived any complaint of error that might be involved.

E. The District Court Did Not Admit Evidence Outside the Issues of This Case.

Appellant's final contention with respect to the trial court's rulings on the admission of evidence, is that the court admitted a "welter of evidence" which was outside the issues of this case. (A. O. B. pp. 68-69). Appellant cites no authority in support of this argument but instead lists six items claimed to have been erroneously received. In rebuttal, appellee will simply list the items in order and point out their relevance as it pertains to this case.

First, the planning memorandum prepared by the trust company for Mr. Cobin [Deft. Ex. E]. This document was neither offered nor received to prove the truth of any of the statements contained therein, as was expressly pointed out at the trial [p. 89, line 23 to p. 90, line 4].

Second, Mr. Bloome's letter to Mr. Cobin dated January 11, 1954 [Deft. Ex. D, p. 106]. Appellant refers to this as a letter referring to an appointment for a medical examination, but it is not. Having been directed to Mr. Cobin, it was admissible as an admission and tended to show, in view of the other evidence, that Mr. Cobin was undecided whether to complete his application to appellee.

Third, a conversation between Mr. Bloome and Mrs. Cobin after Mr. Cobin's death [p. 123, line 12 to p. 126, line 12]. At this conversation Mr. Bloome attempted to have Mrs. Cobin reapply to appellee for insurance on her own life. Although insurance was discussed, Mrs. Cobin at that time made no inquiry with respect to Mr. Cobin's alleged policy nor did she then claim that his policy had been returned to be increased from $25,000.00 to $50,000.00. Such was both relevant and admissible as an admission by silence on the part of Mrs. Cobin.

Fourth, a conversation between Mr. Koff and Mr. Cobin stated to have occurred a year before the transaction here involved [p. 160, line 14 to p. 166, line 4].

This conversation did not occur a year prior to the transaction here involved but actually occurred just after Mr. Cobin executed his application. Appellant has again misstated the record in this regard, for Mr. Koff testified that the conversation occurred in December 1953 or January 1954 [p. 163, line 11 to p. 164, line 5]. Moreover, the content of the conversation also establishes that it occurred after Mr. Cobin executed his application. In this respect, Mr. Koff testified that Mr. Cobin stated that appellee had offered him an ordinary life contract and asked how he felt it fit into his overall insurance program. Mr. Koff told Mr. Cobin that he could get the same benefits by converting his present contract with the Manhattan Life Insurance Company rather than applying to appellee [p. 164, line 14 to p. 166, line 4]. This evidence was relevant and demonstrated Mr. Cobin's indecision with respect to the insurance offered by appellee.

Fifth, a letter from Mr. Grosten to Mr. Koff dated December 29, 1954, with regard to why Grosten thought Mr. Cobin should keep his Manhattan policy rather than take appellee's policy [Deft. Ex. F]. This letter was clearly relevant for the same reasons as was Mr. Koff's conference with Mr. Cobin. It was admissible because it was shown to and discussed with Mr. Cobin [p. 172, line 24 to p. 173, line 5].

Sixth, Mr. Grosten's testimony concerning the nature and type of the Manhattan policy [pp. 180, 189]. As this was a policy on Mr. Cobin's life, and in fact the one Mr. Cobin was considering utilizing instead of appellee's, its nature was relevant to the issues of this case.

As a review of the above items of evidence demonstrates, no error was committed in admitting the testimony and exhibits referred to into evidence, and appellant's argument to the contrary is completely unjustified, whether the items are considered individually or as a whole.

F. Notwithstanding Appellant's Voluminous Objections, No Prejudicial Error Was Made by the District Court in Its Rulings on the Evidence.

Substantially half of the record in this case is devoted to the objections of appellant to the introduction of evidence. A good portion of these were overruled since they were clearly based on a misconception of the law and the assumption that a valid and subsisting contract of insurance was in force on Mr. Cobin's life on the date of his death. The latter, however, was the very fact in issue at the trial as is shown by the pleadings. The District Court determined the matter unfavorably to appellant and did so on substantial evidence.

In submitting its arguments for reversal, appellant has often omitted reference to certain portions of the record and incorrectly stated certain other portions of the record. A careful reading of the whole record will show that the errors complained of by appellant are non-existent. Even if it be assumed that errors were committed, they clearly were neither substantial nor prejudicial. F.R.C.P. Rule 43 (a) favors the admission of evidence and if any doubt exists, the doubt should be resolved in favor of its reception.

Builders Steel Co. v. Commissioner, 179 F. 2d 377, 379 (8th Cir., 1950);

Grandin Grain & Steel Co. v. U. S., 170 F. 2d 425 (1948);

Utah State Farm v. Union Service, 198 F. 2d 20 (1952).

III.

The District Court Did Not Err in Denying, Without Prejudice, Appellant's Original Motion to File an Amended Complaint.

Appellant's final contention is that the District Court erred in denying her original motion to file an amended complaint. (A. O. B. p. 70). Appellant states that the District Court did so upon "appellee's suggestion" that no objection would be made to an amended complaint which alleged a redelivery to Mr. Bloome and that appellant, consequently, was "obliged" to incorporate an allegation in her second amended complaint that Mr. Cobin's policy was returned to appellee for the purpose of having the policy increased from $25,000.00 to $50,000.00.

Except for the inference that she was forced to plead something she did not want to plead, appellant's contention is moot since the District Court denied appellant's original motion without prejudice and, subsequently, granted her second motion to amend. [Clk. Tr. p. 21]. Moreover, the District Court's action in this regard was purely in accordance with the affidavit of Mr. Horwin filed in support of appellant's original motion. (Appendix). This affidavit stated the amendment was requested on the ground that it was "necessary, and in the interests of the trial of the cause" that the "complaint be amended to show the facts disclosed" which, the affidavit stated, were that appellant contended that Mr. Cobin's policy was returned to appellee "for the purpose of having the policy increased in amount from $25,000.00 to $50,000.00." Notwithstanding these statements in Mr.

Horwin's affidavit, the amended complaint offered for filing did not contain these facts.

This affidavit, as well as appellant's testimony at the trial [p. 57, line 15 to p. 59, line 22], clearly establishes that appellant was not, against her wishes, "obliged" to allege facts she did not want to allege.

Conclusion.

In the section entitled "General Statement" of her Opening Brief (pp. 12-14), appellant attacks the insurance business in general and calls upon the Court to reverse the District Court's decision which she describes as "a retrogressive application of elementary principles of insurance law, and which invites once again judicial supervision over practices and procedures of insurance companies which can only undermine the confidence of the public and the efficacy of the insurance contract as an instrument of protection rather than a snare for the deluded." Such statements have no place in this appeal for the plain fact is that Mr. Cobin just didn't want the insurance that was offered to him. This was a decision Mr. Cobin made after many consultations not only with other independent insurance salesmen but also with his own attorney.

Appellee did not and has not engaged in any untoward practices or procedures requiring supervision by the judiciary or otherwise, nor does appellee now seek to relieve itself from liability by reliance upon a technical interpretation of a provision in an insurance policy. Moreover, this is not a situation where it can be argued that the layman would normally feel that he was protected. Cer-

tainly Mr. Cobin was not deluded. He was a successful businessman capable of making important decisions. Before he made application to appellee for insurance, his entire estate was analyzed by the Title Insurance and Trust Company. After he made application for the insurance in question, he discussed his overall insurance program with Mr. Koff, Mr. Grosten and even his attorney, Mr. Emmer. Mr. Cobin then, for reasons intimate to himself, decided he did not need or want additional insurance and therefore declined the policy offered by appellee. Hindsight reveals nothing more than that his decision was unfavorable from his standpoint.

Under the circumstances here presented, the District Court properly concluded that no contract of insurance existed between appellee and Leo Cobin at the date of his death. Appellee accordingly urges this Honorable Court to affirm the judgment of the District Court.

Respectfully submitted,

Adams, Duque & Hazeltine,
Attorneys for Appellee.

Henry O. Duque,
James S. Cline,
Of Counsel.

APPENDIX.

Affidavit of Leonard Horwin

State of California, County of Los Angeles—ss.

Leonard Horwin, being first duly sworn, states:

At all times since on or about August 21st, 1956, your affiant was and now is one of the attorneys for the plaintiff in this action.

In the course of preparation of this case for trial, your affiant has discovered that on or about the middle of February, 1954, subsequent to the issuance by defendant of Policy No. 243,946 upon the life of Leo Cobin, the deceased, said Policy was in fact delivered by said defendant to the deceased; thereafter, on or about the latter part of February, 1954, the deceased delivered the aforesaid Policy to Chester Bloome, Agent for the defendant, for the purpose of having the Policy increased in amount from $25,000.00 to $50,000.00.

The aforesaid facts, disclosed in part, by the Deposition taken of Chester Bloome on October 6th, 1956, were fully brought out at the Deposition taken of the plaintiff December 11th, 1956.

In view of the foregoing discovery, it is necessary, and in the interests of trial of the cause upon the merits, that Paragraphs 4 and 5 of the Complaint be amended to show the facts as thus disclosed.

The present time is the earliest practicable time for plaintiff to make said Amendment, based upon said discovery of facts, and no prejudice results to defendant.

WHEREFORE, your affiant prays for an Order granting leave to the plaintiff to file her First Amended Complaint in the form as annexed hereto.

s/LEONARD HORWIN
LEONARD HORWIN

Subscribed and sworn to before me this 17th day of December, 1956.

RICHARD KELTON
Notary Public in and for said County and State